APR 24 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1966

No. 1313

PERTH AMBOY DRY DOCK CO.,

Petitioner.

vs.

JOHN HANSEN,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

ISIDOR KALISCH,
Counsel for Petitioner.
60 Park Place,
Newark, New Jersey, 07102.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES INVOLVED	3
STATEMENT OF CASE	3
REASONS FOR GRANTING WRIT	5
CONCLUSION	11
APPENDIX:	
"A"—Opinion of the Supreme Court of New Jersey	1a
"B"—Mandate on Reversal	13a
"C"—Per Curiam Opinion of Superior Court of New Jersey, Appellate Division	14a
"D"—Petition for Rehearing to New Jersey Supreme Court	15a
"E"—Relevent State Statutes	16a
"F"—Relevant Federal Statutes	17a

Cases Cited

Allisot v. Federal Shipbuilding & Drydock Co., 4 N. J. 445 (1950)	8
Avondale Marine Ways v. Henderson, 346 U. S. 366	7
Calbeck v. Travellers Insurance Co., 370 U. S. 114, 8 L. Ed. 2d 368 (1962)	4, 6, 10

PAGE

Continental Casualty Co. v. Lawson, 64 F. 2d 802 (5th Cir.) 9

DeBardeleben Coal Corp. v. Henderson, 142 F. 2d 481 10

DeGraw v. Todd Shipyards Corp., 133 N. J. L. 402 ... 8

Flowers v. Travelers Insurance Co., 258 F. 2d 220, cert. denied, 359 U. S. 920 9

Grant-Smith Porter Shipping Co. v. Rhode, 257 U. S. 469 ..... 6, 8

Hahn v. Ross Island Sand & Gravel Co., 358 U. S. 272 (1959) 9

Kelly v. R.T.C. Shipbuilding Corp., 87 N. J. Super. 313 (App. Div. 1965) 8

Motor Boat Sales Co. v. Parker, 314 U. S. 244 (1941), rehearing denied, 314 U. S. 760 (1942) 6

Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232 (1928) 8

Royal Indemnity Co. v. Puerto Rico Cement Corp., 142 F. 2d 237, certiorari denied, 323 U. S. 756 (1944) 6

Ryan Stevedoring Co. v. Pan. Atl. S.S. Corp., 300 U. S. 124 (1956) 6

Statutes Cited

L. 1911, c. 95-7 2

N.J.S.A. 34:15-7 (New Jersey Workmen's Compensation Act) 2, 3, 5, 7

Article 2 2

28 U.S.C.:

Sec. 1257(3) 2

PAGE

33 U.S.C.A. (Longshoremen's and Harbor Workers' Compensation Act):

Secs. 901-902 (plac. 4), 903-905 ..... 3-7, 10, 11

Sec. 903(a) 10

46 U.S.C.A.:

Sec. 4 10

Secs. 18, 46, 51, 493 ..... 3, 11

Other Authorities Cited

Larson:

p. 413 9

S. Rep. No. 673, 69th Cong., 1st Sess., 16 6

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1966

No. _____

PERTH AMBOY DRY DOCK CO.,

Petitioner,

vs.

JOHN HANSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable the Chief Justice of the United States, and the Associate Justices of the United States:

(*Italics mine unless otherwise noted.*)

Petitioner, Perth Amboy Dry Dock Co., prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in the above cause on January 23, 1967, upon which a Mandate issued pursuant to the practice in that Court made and provided, by which it is ordered and adjudged that the judgment of the Superior Court of New Jersey, Appellate Division, reversing the compensation award made to the petitioner below, and against the respondent, Perth Amboy Dry Dock Co., be

itself reversed, and reinstating the earlier award of compensation to the petitioner below, under Article 2 of the New Jersey Workmen's Compensation Act, L 1911 c 95-7 (N.J.S.A. 34:15-7, its amendments and supplements). *vide* Appendix "E".

Citations to Opinions Below

The opinion of the Supreme Court of New Jersey, 48 N. J. 389, reinstated the original compensation award made by the N. J. Department of Labor and Industry, Division of Workmen's Compensation (A65a to A89a). The Supreme Court opinion dated January 23, 1967, and its Mandate following same are respectively printed in Appendices "A" and "B". The award had been reversed by the Middlesex County Court on appeal, and is found at A10a to A14a of the Appendix submitted to the Superior Court of New Jersey, Appellate Division on petitioner's appeal to that Court. The Appellate Division in an unreported opinion affirmed the County Court and is printed in Appendix "C". Our Petition to the Supreme Court of New Jersey for Rehearing, was denied by its order dated February 15, 1967 and printed in Appendix "D".

Jurisdiction

The opinion and judgment of the Supreme Court of New Jersey, containing the reversal of the Superior Court of New Jersey, Appellate Division and its Mandate, are respectively in Appendices "A" and "B".

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. 1257(3).

Question Presented

Does not the Longshoremen's and Harbor Workers' Compensation Act have exclusive jurisdiction thus barring application of the N. J. Workmen's Compensation Act under the following facts, where

(a) An employee, engaged as a painter by a dry dock company, which was located on a navigable stream of the United States, was injured while paint lettering the name of a customer's completed ship on its stern.

(b) The ship was so long it projected beyond the dry dock and he performed his work from a ladder on a float resting on a navigable stream of the United States.

(c) The painting being performed for the ship owner was in obedience to the shipping laws of the United States. vide Appendix "F".

Statutes Involved

The New Jersey Workmen's Compensation Act of 1911, Chapter 95, Appendix E, Longshoremen's and Harbor Workers' Act, Title 33 U. S. C. A. Sections 901, 902 (plac. 4), 903, 904 and 905; Title 46 sections 18, 46, and 51 (shipping), and Title 46, section 493 (passengers and merchandise). They are printed in Appendix F.

Statement of Case

Following the filing of a Workmen's Compensation claim petition based upon the New Jersey Workmen's Compensation Act of August 17, 1962, the employer served a Notice of Motion to dismiss the claim petition upon two grounds (a) the N. J. Department of Labor and Industry lacked jurisdiction over the subject matter, and (b) that receipt of benefits (by the petitioner) under the Federal statute

was an election of remedy precluding receipt of State benefits, which was discussed by the Judge of Compensation during his determination of the question of liability of the petitioner's employer. The motion was deferred until the time of trial, and subsequent to the service of such notice of motion, and more particularly on August 17, 1962, the employer filed its answer, setting up both contentions for the dismissal of the claim petition, later eleminating reason (b). In dealing with the merits of the controversy, briefs were filed by the respective parties.

The respondent urged that *Calbeck* v. *Travellers Insurance Co.*, 370 U. S. 114; 8 L. Ed. (2d) 368 (1962) warranted the single conclusion that the State Court had no jurisdiction to entertain the action. *Vide* Appendix to appellant's brief, Superior Court of New Jersey, Appellate Division (A67a-23 to A68a-13). The Notice of Motion did not appear in the record, but as earlier stated, the County Court had it before him and passed upon the merits of the contention, dismissing the claim petition under the employer's contention that the N. J. Department of Labor and Industry lacked jurisdiction over the subject matter. At each stage of the litigation the employer has contended that petitioner's exclusive remedy was under the Longshoremen's and Harbor Workers' Act. The injured employee testified that the dry dock was entirely in the water of the Arthur Kill, a navigable stream of the United States and there is no contradictory evidence.

The County Court further concluded that there was no concurrent State jurisdiction to hear and determine the matter; that the injured was not working on a major repair project, nor was there an conversion of the ship taking place. He concluded that petitioner's remedy was exclusively under the Longshoremen's and Harbor Workers' Act and thereupon dismissed the claim petition. The

County Judge's decision above noted, was made on August 4, 1965 and is printed in Appendix to appellant's brief A10a to A14a, being followed by an Order of Reversal and Dismissal of Claim Petition (A15a to A16a).

Following the affirmance of the dismissal of the claim petition by the Appellate Division, petitioner applied to the Supreme Court of New Jersey for certification, which was granted. As earlier stated the Supreme Court of New Jersey reinstated the original compensation award to the claimant. Following the Supreme Court opinion and its mandate, the employer filed its Petition for Rehearing, wherein it continued to assert that (a) the doctrine of "twilight zone" was not applicable, and (b) painting the name of the ship on its stern was required of its owner under the Federal statute and a penalty was imposed for non-compliance.

Reasons for Granting Writ

I urge that there is a conflict on the question of law on the issue involved, as determined by this Court, and a contrary holding by the Supreme Court of New Jersey. It is our contention that the Supreme Court of New Jersey has decided this Federal question of substance in a way probably not in accord with the applicable decisions of this Court.

I contend that the application of the New Jersey statute on which the award was based invaded the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act. I also contend that the job on which the claimant was injured was in the performance of the Federal statutory duty imposed upon the owner of the ship to paint the name of the ship on its stern.

This Court has impliedly held that section 903 of the Longshoremen's and Harbor Workers' Act sets up a com-

plete system of workmen's compensation effective in the Federal field, which necessarily bars its invasion by State legislation. *Royal Indemnity Co.* v. *Puerto Rico Cement Corp.*, 142 F. (2d) 237 *certiorari* denied 323 U. S. 756 (1944). A similar ruling was made by this Court in *Ryan Stevedoring Co.* v. *Pan. Atl. S.S. Corp.*, 300 U. S. 124 (1956).

In *Motor Boat Sales Co.* v. *Parker*, 314 U. S. 244 (1941), rehearing denied 314 U. S. 760 (1942) it is held that no specious reasoning shall serve to remove a claim within Federal jurisdiction into that of a State Court. It further suggests that such presumption favoring exclusive Federal jurisdiction cannot be removed by mere semantics.

In the now famous opinion of this Court in *Calbeck* v. *Travellers Insurance Co.*, 370 U. S. 114 (1962), Justice Brennan quotes from *Grant-Smith Porter Shipping Co.* v. *Rhode*, 257 U. S. 469 the following:

> "But (above case) had made clear that State compensation statutes could not, constitutionally be applied to injuries to employees injured in repair work on completed vessels on navigable waters."

A serious discussion of the reason for the passage of the Longshoremen's and Harbor Workers' Act is noted in the footnote of p. 121 of the *Calbeck* opinion.

See S. Rep. No. 673, 69th Cong., 1st Sess., at 16:

> "The purpose of this bill is to provide for compensation in the stead of liability, for a class of employees commonly known as 'Longshoremen.' These men are mainly employed in loading, unloading, refitting and repairing ships, et seq."

I urge that Hansen's service comes within this class.

The opinion below would seem to follow the old philosophy of "maritime but local" and thus avoid exclusiveness of the Longshoremen's and Harbor Workers' Act. The interesting philosophy touched upon at p. 377 of *"Calbeck"* relating to the subject of "twilight zone" dissolves, since here there could be no difficulty in determining whether or no the State law was applicable. The limited application of the twilight zone principle emerges only where at first blush there might be doubt as to whether the claim rested within the coverage of the local law or of the Longshoremen's and Harbor Workers' Act. There was no such difficulty here. Here, the accident occurred on a completed ship resting on navigable waters of the United States while the injured was performing an act required under Federal law.

In *"Davis"* the accident happened to a structural steel worker in dismantling a bridge across a navigable river. His work was upon a land structure, which is a far cry from the picture here presented.

The concurrent jurisdiction applied in the cited case resembled the pronouncement of this Court in *Avondale Marine Ways* v. *Henderson,* 346 U. S. 366, wherein the injured suffered his accident on land, thus permitting the application of the concurrent jurisdiction principle. In *"Calbeck"* the similarity I urge, is pointed out in its discussion of the issue in *Avondale Marine Ways* v. *Henderson, supra.*

In the opinion below it is stated that petitioner's employment was sufficiently local in character as to make appropriate the N. J. Workmen's Compensation Act. The opinion further states:

> "Petitioner worked four to five weeks each year exclusively on land."

This apparently was calculated to add force to a contention of concurrent jurisdiction. Such philosophy has been rejected by this Court in *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; 49 S. Ct. 88; 73 L. Ed. 232 (1928). In that case the employee worked both upon the land and upon the water, but received fatal injury while doing stevedoring work on a vessel lying in navigable waters. In the holding that the Federal jurisdiction was paramount, the following cogent statements appear:

> "The fact that Strand worked the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

In the instant case the Supreme Court of New Jersey improperly noted as important that of the fifty-two weeks of employment per year, the injured worked for five weeks on land.

The reference made below to *Grant-Smith Porter Ship Co.* v. *Rohde,* provides no aid to the position of the petitioner below, since there the injured was working on a ship under construction, resting on navigable waters of the United States. Federal jurisdiction was not exclusive because it was not a completed ship.

The opinion below cites *Allisot* v. *Federal Shipbuilding & Drydock Co.,* 4 N. J. 445 (1950); *DeGraw* v. *Todd Shipyards Corp.,* 133 N. J. L. 402 and *Kelly* v. *R.T.C. Shipbuilding Corp.,* 87 N. J. Super. 313 (App. Div. 1965), as though these cases would turn back our contention that the instant injury came within the exclusive jurisdiction of the Federal law. An examination of the cases presents the factual situation of extensive repairs, practically a reconstruction of the vessels involved. The factual picture involved was, therefore, entirely different from the one here presented.

The opinion below cites *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U. S. 272 (1959), in support of its conclusion. It completely overlooks the holding of that case at 372 that:

> "Where admiralty jurisdiction is clearly presented the Federal remedy is mandatory."

In *Flowers* v. *Travelers Insurance Co.*, 258 F. 2d 220 *cert.* denied 359 U. S. 920, it was concluded that a welder injured while making repairs on an ocean-going tanker was held to be within the exclusive coverage of the Longshoreman's Act. On this score the Larson Text p. 413 reads:

> "There is no twilight zone for injuries sustained on navigable waters while employee is engaged in essential repairs to an existing vessel."

The opinion below would reject our contention with a very short statement, that the twilight zone applied though the accident happened on navigable waters, because there was such sufficient connection with the State that a State remedy will be presumed valid, even though there might be Federal coverage.

The opinion below completely disregarded the fact that the name painting was directed by Federal legislation. It was a maritime service imposed upon this claimant's employer.

The opinion below likewise rejects this Court's approval of the philosophy of *Continental Casualty Co.* v. *Lawson*, 5th Cir. 64 F. (2d) 802, 804, that Federal Compensation laws should be liberally construed to cover every case where the injury occurs on navigable waters and where within the rule of (*Jensen*) . . . the action would have been in admiralty.

I would point out other Federal statutory enactments supporting my contention. Under Title 33, 902, 4th par.

> "The term 'employer' means an employer any of whose employees are in maritime employment, in whole or in part, upon navigable waters of the United States (including any dry dock)."

Undoubtedly Title 46, U. S. C. A. indicates coverage and control of coastwise and trans-oceanic commerce by water. There is nothing local in the performance of the Federal statutory requirements imposed upon owners of ships. I urge that only specious reasoning would bring Hansen's injury within the "twilight zone" philosophy.

The Federal Commissioner of Customs is charged with the obligation of preparing and publishing a list of vessels of the United States belonging to the commercial marine, specifying the official number, signal letters, names, etc.

Vide Title 46, sec. 4.

Every vessel is obliged to have a "home port." Title 46, sec. 18.

In *"Calbeck"* at p. 378, we find approval of the philosophy of *DeBardeleben Coal Corp.* v. *Henderson,* 142 F. (2d) 481, 483, 484. The philosophy expounded there is that the Federal legislation left no room for doubt that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter; Title 33, §903(a) is not a relinquishment of any power, but rather Congressional intention not to regulate beyond its Constitutional power and that no ground is to be yielded to State jurisdiction.

I urge that a short distillation of the controlling philosophy of this Court is that where, as here, the injury occurs on a completed vessel resting in navigable waters of

the United States to a workman engaged as Mr. Hansen was, his claim is exclusively under the Longshoremen's and Harbor Workers' Act. The obligation to paint the name of the ship was imposed by Federal law upon the owner. A violation of this statutory injunction imposes a penalty upon the owner, Title 46, sec. 46. The several statutory enactments with respect to the same clearly establishes that it was not within the jurisdiction of the State of New Jersey.

The opinion below would place this case either within the "twilight zone" or "local concern" philosophy. I urge that neither is applicable in the light of what I have urged.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ISIDOR KALISCH,
Attorney for Petitioner,
Perth Amboy Dry Dock Co.
60 Park Place,
Newark 2, New Jersey 07102

[APPENDICES FOLLOW]

APPENDIX "A"

SUPREME COURT OF NEW JERSEY

A-31 SEPTEMBER TERM 1966

JOHN HANSEN,

Petitioner-Appellant,

vs.

PERTH AMBOY DRY DOCK CO.,

Respondent-Respondent.

Argued November 9, 1966. Decided January 23, 1967.

On appeal from the Superior Court, Appellate Division.

Mr. Jack Mandell argued the cause for the Petitioner-Appellant (*Messrs. Balk and Jacobs*, attorney; *Mr. Jack Mandell* on the brief).

Mr. Isidor Kalisch argued the cause for the Respondent-Respondent.

The opinion of the court was delivered by PROCTOR, J.

This is a workmen's compensation case. Petitioner, John Hansen, was injured in the course of his employment as a ship painter. He received benefits for 49 weeks and 5 days under the federal compensation remedy, the Long-

shoremen's and Harbor Workers' Act, 33 U.S.C.A. §901 *et seq.* Then he filed a petition for workmen's compensation under the laws of New Jersey. N.J.S.A. 34:15-1 *et seq.* The judge of compensation found for petitioner and made an award. The County Court reversed, holding that the federal compensation remedy was exclusive. The Appellate Division affirmed. We granted certification. 47 N. J. 239 (1966).

The facts are not disputed. Respondent has extensive dry dock facilities in Perth Amboy covering some two blocks and including shops for machine, carpentry, electric and paint work together with two warehouses and about 16 garages. Its dry docks are located on the Arthur Kill, navigable waters of the United States flowing between New Jersey and Staten Island, New York. Petitioner worked for respondent as a painter since 1956.

On April 15, 1959 petitioner was painting the stern of a ship. The ship was longer than the dry dock, and as a result he was required to use a ladder supported by a raft on the water in order to get access to the ship's stern. It was a new ship. While petitioner was lettering the name of the ship, the ladder broke and he fell and suffered serious injuries.

Most of petitioner's work consisted of painting ships in dry docks, some new and some already in operation. He did not work on moving ships or those at anchor. About four or five weeks each year he spent on land painting equipment or buildings of respondent.

Respondent carried workmen's compensation insurance with the same insurance company for petitioner and other employees under both federal and state acts. As mentioned, prior to this claim petitioner received compensa-

tion benefits designated by the insurance company as payable under the federal act. On this appeal respondent does not contend that the receipt of these federal benefits caused an election of remedies which would bar the present claim. *Cf. Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114, 131-132, 8 L. Ed. 2d 368, 379 (1962).

It is clear that petitioner is entitled to compensation under the Longshoremen's and Harbor Workers' Act because his injury occurred on navigable waters of the United States. *Calbeck, supra,* 370 U. S. at 124, 8 L. Ed. 2d at 375. The single issue on this appeal is whether compensation may validly be given petitioner for his work-connected injuries under the compensation laws of New Jersey or whether the remedy available under the federal act is exclusive.

The starting point for cases having to do with compensation of amphibious workers injured on navigable waters is *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 61 L. Ed. 1086 (1917). There the United States Supreme Court held that the widow of a longshoreman killed on a ship while unloading cargo could not constitutionally receive compensation for his work-connected fatal accident under the laws of the State of New York. Such a state recovery, it was said, would interfere with the proper harmony and uniformity of the maritime law in its international and interstate relations and violate Art. III, sec. 2 and Art. I, sec. 8 of the United States Constitution. *Jensen, supra*, 244 U. S. at 215-216, 61 L. Ed. at 1098. This led to the harsh result of denying a compensation remedy to amphibious workers for injuries received on navigable waters because at that time there was no federal compensation act.

Congress took steps to remedy this hardship. It twice tried to empower the states to grant a blanket compensation coverage to amphibious workers, but these attempts were struck down by the Supreme Court as unlawful delegations of federal power to the states. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 64 L. Ed. 834 (1920); *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 68 L. Ed. 646 (1924). In response to this judicial position Congress in 1927 passed the Longshoremen's and Harbor Workers' Act which provided a federal compensation remedy for workers injured on navigable waters:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." 33 U.S.C.A. §903(a).

This Act continued the congressional view that the states should have and exercise the maximum permissible coverage of amphibious workers in their states whether injured on land or on navigable water. See Rodes, "Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone," 68 *Harv. L. Rev.* 637, 639 (1955); Morrison, "Workmen's Compensation and the Maritime Law," 38 *Yale L. J.*, 472, 500 (1929).

The Supreme Court itself interpreted the *Jensen* rule so as to allow expansion of the constitutionally permissible area of state compensation for injuries occurring to certain workers on navigable waters apparently to ameliorate the situation of amphibious workers. The automatic

rule of *Jensen* (*i.e.* "water's edge") was modified to allow consideration of the facts of each case. If the state recovery would not work material prejudice to a characteristic feature of the general maritime law, application of a state compensation remedy was held constitutional. Although maritime in character, the following employments were held to be sufficiently local to support state compensation remedies: *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 66 L. Ed. 321 (1922) (construction of ships); *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59, 70 L. Ed. 470 (1926) (removing obstructions from river by divers) *Sultan Ry. & T. Co.* v. *Dep't of Labor & Ind.,* 277 U. S. 136, 72 L. Ed. 820 (1928) (logging operations solely on navigable waters). Later the Supreme Court held that application of the state remedy to an amphibious worker injured on navigable waters would be presumptively constitutional. *Davis* v. *Department of Labor of Washington.* 317 U. S. 249, 257-258, 87 L. Ed. 246, 251 (1942) (steelworker drowned when he fell from a barge while dismantling a bridge).

A traditional answer to the present case could be found by seizing on the undisputed fact that the ship here was new and in the process of completion by being painted as distinguished from a ship already in commerce which was being repaired. It is settled that where the worker injured on navigable waters was working on new ship construction, a state may validly provide its compensation remedy. *E.g. Grant Smith-Porter Ship Co.* v. *Rohde, supra.* New Jersey courts have recognized the validity of the state remedy where the worker was injured on the conversion of a ship from one use to another, which work was said to be equivalent to construction of a new ship. *Allisot* v. *Federal Shipbuilding & Drydock Co.,* 4 N. J. 445 (1950); *DeGraw* v. *Todd Shipyards Co.,* 134 N. J. L. 315

(E. & A. 1946), *cert. den. sub. nom. Todd Shipyards Corp.* v. *DeGraw*, 329 U. S. 759, 91 L. Ed. 655 (1946); *Kelly* v. *R.T.C. Shipbuilding Corp.*, 87 N. J. Super. 313 (App. Div. 1965).

We think, however, that the availability of the state compensation remedy should not turn on the fortuitous circumstance of whether the ship on which an artisan was working was being constructed or being repaired. As Chief Justice Qua said for the Supreme Judicial Court of Massachusetts:

> "[T]he distinction between working on navigable water in repairing a previously completed vessel and doing precisely the same work on navigable water upon a vessel in the process of construction may be thought a narrow one of doubtful practical validity." *Moore's Case*, 323 Mass. 162, 167-168, 80 N. E. 2d 478, 481 (1948).

The employee in that case was an ironworker who performed some duties on land and some on ships; he was injured while making repairs to a ship on navigable waters. The Massachusetts court affirmed an award of state compensation by finding that the employment relation was sufficiently land-based to support a state award. The state jurisdiction was presumptively correct because the local and land-based activities put the case within the *Davis* rule. This decision was affirmed by the United States Supreme Court *per curiam sub nomine Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, 93 L. Ed. 417 (1948). When the California courts denied state compensation to a laborer who worked on both land and water and who was injured while making repairs to a ship on navigable waters, the United States Supreme Court reversed in a memorandum

decision citing *Moores* and *Davis*. *Baskin* v. *Ind. Acc. Comm.*, 338 U. S. 854, 94 L. Ed. 523 (1949). *Baskin* is particularly strong in its application of the presumption of the constitutionality of the state remedy as first set forth in *Davis* because in *Baskin* the Supreme Court in effect told the state court to make an award which it had previously denied.

The question as we understand it is not whether the ship was being constructed or being repaired but whether the *employment relation* (as distinguished from the work being done at the time of the accident) was sufficiently local that the state has a valid interest in providing its compensation, remedy or whether the employment relation was so characteristically maritime that application of state law would work material prejudice to the general maritime law. *Moores* and *Baskin* show a departure from the reasoning of the earlier case of *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 86 L. Ed. 184 (1941) which seemed to make the character of the work at the time of the accident—local or maritime—the key to the determination of whether the state or federal act applied. However, it should be noted that this opinion, written by Justice Black, supported a federal compensation remedy to the family of a drowned employee who normally worked on land. At the time *Parker* was decided, it was widely believed that the federal act could not apply if a state could validly grant compensation. Moreover, *Parker* must be read in the light of the later case of *Davis, supra,* also authored by Justice Black, which ordered a state remedy for a workman killed on navigable waters.

We think the employment relation here was sufficiently local in character that our state compensation act may validly provide a remedy for petitioner's work-connected

injury. Petitioner worked four to five weeks each year exclusively on land. A substantial part of his work at respondent's dry docks was on new boats which is an activity long considered to be local in character. His employer had substantial physical assets on New Jersey land, and the employment contract itself was based in the State of New Jersey and was not transitory. See *Cordova Fish & Cold Storage Company* v. *Estes,* 370 P. 2d 180 (S. Ct. Alaska 1962).

The remarks of Justice Heher writing for this Court in *Allisot* are particularly apt:

> "There is a marginal area that encompasses cases in which the employment combines characteristics common to both maritime and nonmaritime service, where neither the employment nor the particular service is to be identified with navigation or commerce as that the application of the local rule would work material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations, and so the matter is essentially of local concern and the rules of the maritime law may be modified or supplemented by state law without running afoul of the Federal Constitution. Such is the case here. The claimant was employed as a painter on land and on navigable waters—on vessels in process of construction and in the repair and reconstruction of vessels in service; neither his contract of employment nor his service in the reconstruction of the vessel in question were so directly related to navigation or commerce as to exclude local law in making compensation for injury

> suffered in the doing of his work on the ground of material prejudice to the general maritime law." *Allisot* v. *Federal Shipbuilding & Drydock Co., supra*, 4 N. J. at 453.

Other New Jersey cases have granted state compensation to amphibious workers injured on navigable waters whose employment was local in character. *DeGraw* v. *Todd Shipyards So.* and *Kelly* v. *R. T. C. Shipbuilding Corp.*, both *supra*. Those cases which have found the federal jurisdiction to be exclusive have turned on the determination that the injured workman was engaged in purely maritime employment. *Green* v. *Simpson & Brown Const. Co.*, 14 N. J. 66, 70-71 (1953) (dredge watchman); *Hardt* v. *Cunningham*, 136 N. J. L. 137, 143-144 (S. Ct. 1947) (barge captain); *Gaddies* v. *Trenton Marine Terminal, Inc.*, 86 N. J. Super. 125, 128 (App. Div. 1965) (stevedore).

The facts here show an area of state jurisdiction in what has frequently been called the "twilight zone." An employee working in this twilight zone, though injured on navigable waters, has a sufficient connection with the state so that a state remedy will be presumed valid even though the employee might also have a federal compensation remedy. *Allisot, Davis, Moores,* and *Baskin*, all *supra*.

Respondent has not suggested any detrimental effect which a state recovery here would have upon a general maritime interest. Because of the nature of the work done by petitioner, some on land and some on water, respondent must of necessity have coverage under both state and federal acts. As said above such dual coverage has in fact been obtained and both policies are written by the same insurance carrier. We note that the added cost of such

dual coverage is nominal. 2 Larson, *Workmen's Compensation* §89.60, 419 n. 5 (1961); Note, 50 *Calif. L. Rev.* 342, 346-347 (1962).

Respondent contends that concurrent state and federal jurisdiction in the twilight zone was supported prior to *Calbeck* only by the ambiguity of coverage under state and federal acts. See *Donleavy* v. *Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 89-94 (Cty. Ct. 1951) *aff. o. b.* 20 N. J. Super. 486 (App. Div. 1952). Because of this ambiguity an injured employee might lose a compensation remedy by applying for it in the wrong forum. Respondent argues that *Calbeck* makes the federal act exclusive in the twilight zone because an amphibious worker injured on navigable waters now has a certain remedy under the federal act.

It was held by the United States Supreme Court prior to *Calbeck* that the certain availability of a federal remedy was not a sufficient cause to preclude the state from taking jurisdiction of a case and granting relief to an injured employee under state law. The Oregon Supreme Court denied a state remedy (an action at law because the employer had elected not to provide state compensation coverage) to an oiler injured while working on a barge on navigable waters because the employee's sole remedy was said to be under the federal act. *Hahn* v. *Ross Island Sand & Gravel Co.*, 214 Ore. 1, 320 P. 2d 668 (1958). The United States Supreme Court reversed, holding the case to be in the twilight zone and properly one of concurrent state and federal jurisdiction. *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U. S. 272, 3 L. Ed. 2d 292 (1959). As the dissent points out, this decision was reached notwithstanding that the employee had spurned the compensation benefits clearly available to him at all times under the federal act. *Id.*, 358 U. S. at 274, 3 L. Ed. 2d at 294.

We find nothing in *Calbeck* which indicates a limitation on state jurisdiction to compensate amphibious workers or tends to change the holding of *Hahn*. In *Calbeck* two welders were injured while working on the construction of new ships on navigable waters. The Court of Appeals reversed awards of federal compensation because a state could validly apply its laws to employees working on the construction of ships. In fact, one of the welders had already received compensation benefits from Louisiana for his injury. The Supreme Court reversed, holding that the federal act applied to all injuries on navigable waters regardless of whether a state might also validly compensate the injury. The welder who had received state benefits was denied a double recovery but was not precluded from receiving any advantage otherwise obtainable. Two quotations in particular show that the Supreme Court did not intend to limit state jurisdiction:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck*, 370 U. S. at 117, 8 L. Ed. 2d at 371.

> "Congress grought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law." *Calbeck*, 370 U. S. at 126-127, 8 L. Ed. at 377.

Thus the Court recognized that state jurisdiction was concurrent for injuries occurring on navigable waters under

factual situations where the state can constitutionally provide a compensation remedy. 2 Larson, *Workmen's Compensation* §89.25, 415-417 (1961) and 481-482 (Supp. 1966); Note, 10 *U. C. L. A. L. Rev.* 1225, 1231-1233 (1963); Note, 48 *Cornell L. Q.* 532, 540-541 (1963); Note, 31 *Fordham L. Rev.* 398, 402 (1962); see *Michigan Mutual Liability Company* v. *Arrien*, 233 F. Supp. 496, 500 (S. D. N. Y. 1964). We find no intent in *Calbeck* to reduce the remedies for injured workmen by elimination of previously available state compensation coverage.

The most consistent factor appearing in the numerous United States Supreme Court decisions beginning with *Davis* and pertaining to the compensation of amphibious workers is the desire that an injured claimant should receive the maximum compensation possible and "not lose his remedy in a maze of legalisms." Gilmore & Black, *Admiralty* §6-50, 353 (1957). The strong interest of New Jersey in seeing that its injured employees obtain the maximum compensation benefits available under the state law yields to federal exclusivity only when the grant of such state benefits would actually work substantial prejudice to the national maritime law. No such prejudice has here been shown.

For the foregoing reasons we conclude that petitioner is entitled to workmen's compensation under the laws of New Jersey. The judgment of the Appellate Division is reversed, and the judgment of the Division of Workmen's Compensation is reinstated.

APPENDIX "B"

This cause having been duly argued before this Court by Mr. Jack Mandell, counsel for the appellant and Mr. Isidor Kalisch, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Appellate Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court, Appellate Division to be there proceedd with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 23rd day of January, 1967.

JOHN H. GILDEA
Clerk of the Supreme Court

Filed

Jan. 23, 1967

JOHN H. GILDEA
Clerk

A True Copy

JOHN H. GILDEA
Clerk

APPENDIX "C"

Per Curiam Opinion of Superior Court of New Jersey, Appellate Division

Argued January 25, 1966 Decided February 4, 1966.

Before Judges Sullivan, Lewis and Kolovsky.

Mr. Jack Mandell argued the cause for petitioner-appellant (*Messrs. Balk and Jacobs,* attorneys; *Mr. Mandell* on the brief).

Mr. Isidor Kalisch argued the cause for respondent-appellee.

PER CURIAM.

Under the facts in this case, petitioner's remedy is exclusively within the Federal jurisdiction, that provided by the Longshoremen's and Harbor Workers' Compensation Act. The "twilight zone" doctrine is not applicable.

The judgment is affirmed substantially for the reasons given by Judge Convery in the Middlesex County Court.

APPENDIX "D"

Petition for Rehearing to New Jersey Supreme Court

No Justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 15th day of February, 1967.

A True Copy

JOHN H. GILDEA
Clerk

Filed

Feb. 15, 1967

JOHN H. GILDEA
Clerk

APPENDIX "E"

N. J. Workmen's Compensation Act. 34:15-7. Compensation by agreement; defenses; burden of proof.

When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of this article compensation for personal injuries to, or for the death of such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34:15-12 and 34:15-13 of this title in all cases except when injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury and the burden of proof of such fact shall be upon the employer.

Note: 34:15-12 of this title covers the quantum of compensation payments for injuries, and 34:15-13 covers schedule of payments to dependents of the deceased employee.

APPENDIX "F"

Title 33, U. S. C. A. sec. 901. This chapter may be cited as "Longshoremen's and Harbor Workers' Compensation Act." Mar. 4, 1927, c. 509 §1, 44 Stat. 1424.

Sec. 902 (plac. 4). The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigagle waters of the United States (including any dry dock).

Sec. 903 Coverage. Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occuring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. (remaining provisions inapplicable.)

904. Liability for Compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title.

Sec. 905. Exclusiveness of liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, etc. (balance of paragraph inapplicable).

Title 46. Sec. 18. Home ports of vessels of United States.

For the purposes of the navigation laws of the United States and of sections 911, 921-927, 941, 954,

961, 971-974 and 981-984 of this title, every vessel of the United States shall have a "home port" in the United States, including Alaska Hawaii and Puerto Rico which port the owner of such vessel subject to the approval of the Commissioner of Customs, shall specifically fix and determine, and subject to such approval from time to time change. Such home port shall be shown in the register, enrollment and license, or license of such vessel, which documents, respectively, are referred to as the vessel's documents. (balance of paragraph inapplicable).

Sec. 46. Names and home ports marked on bow and stern.

The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilded, or consist of cut or carved or cast roman letters in light color on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked the owner or owners shall be liable to a penalty of $10. for each name omitted. (balance of paragraph inapplicable).

Sec. 51. Change of name of vessels.

The Commissioner of Customs shall be empowered to change the names of vessels of the United States on application of the owner or owners of such vessels when in his judgment there shall be sufficient cause for so doing.

Appendix F

Sec. 493. Name of steamer exhibited.

Every vessel of the United States, in addition to having her name painted on her stern, shall have the same conspicuously placed in distinct, plain letters of not less than six inches in length on each outer side of the pilot house, if it has such, and in case the vessel has side wheels, also on the outer side of each wheelhouse; and if any such steamboat be found without having her name placed as required, she shall be subject to the same penalty and forfeiture as provided by law in the case of a vessel of the United States found without having her name, and the name of the port to which she belongs, painted on her stern.

Title 46, Sec. 18. Home ports of vessels of United States (1960).

For the purposes of the navigation laws of the United States and of sections 911, 921-927, 951-954, 961, 971-975, and 981-984 of this title, every vessel of the United States shall have a "home port" in the United States, including Puerto Rico, which port the owner of such vessel, subject to the approval of the Commissioner of Customs, shall specifically fix and determine and subject to such approval may from time to time change. Such home port shall be shown in the register, enrollment, and license, or license of such vessel, which documents, respectively, are referred to as the vessel's documents. (balance of paragraph inapplicable).

SUPREME COURT

Office-Supreme Court
FILED
MAY 12 19
JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1313

PERTH AMBOY DRY DOCK CO.,

Petitioner.

vs.

JOHN HANSEN,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

BALK, JACOBS, GOLDBERGER & MANDELL,
Counsel for Respondent,
1180 Raymond Boulevard,
Newark, New Jersey, 07102.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-5611-12

TABLE OF CONTENTS

	PAGE
ARGUMENT	1
CONCLUSION	4

Cases Cited

Avondale Marine Ways v. Henderson, 346 U. S. 366	3
Baskin v. Industrial Accident Commission, 338 U. S. 854, 70 S. Ct. 99, 94 L. Ed. 523 (1949)	4
Bethlehem Steel Co. v. Moores, 355 U. S. 874, 69 S. Ct. 233, 93 L. Ed. 417 (1948)	4
Calbeck v. Travellers Insurance Co., 370 U. S. 114; 8 L. Ed. (2d) 368 (1962)	3
Coon v. Kennedy, 39 S. Ct. 158, 248 U. S. 457, 63 L. Ed. 359	2
Grant Smith-Porter Ship Co. v. Rhode, 257 U. S. 469, 66 L. Ed. 321 (1922)	3
Royal Indemnity Co. v. Puerto Rico Cement Corp., 142 F. 2d 237 certiorari den. 323 U. S. 756 (1944)	3
Ryan Stevedoring Co. v. Pan Atlantic SS. Corp., 350 U. S. 124 (1956)	3

Statute Cited

28 U. S. C. 1257(3)	1, 2

Other Authority Cited

Defense Bases Act, 42 U. S. C. 1651-1654	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1313

PERTH AMBOY DRY DOCK CO.,

Petitioner,

vs.

JOHN HANSEN,

Respondent.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the United States:

Respondent, JOHN HANSEN, respectfully opposes the granting of a Writ of Certiorari by this Honorable Court to the Supreme Court of the State of New Jersey on the following grounds:

This Court Lacks Jurisdiction In The Premises

Petitioner seeks to invoke the jurisdiction conferred upon this Court by 28 U. S. C. 1257(3). Said statute provides *inter alia*:

> "Final judgment or decrees rendered by the highest Court in a state in which a decision could be had may be reviewed by the Supreme Court as follows:

> (3) By Writ of Certiorari; where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . . ."

Petitioner fails to state exactly which provisions of 28 U. S. C. 1257(3) he is urging (Pb2).

Manifestly, the Judgment of the New Jersey Supreme Court does not draw in question the validity of either a treaty or statute of the United States. That Court states at (3a) ¶2:

> "It is clear that petitioner is entitled to compensation under the Longshoreman's and Harbor Workers' Act because his injury occurred on navigable waters of the United States. (Cite omitted) . . ."

Neither does said Judgment draw in question the validity of a State Statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. In its conclusion set forth at (12a) ¶3, the Court held:

> ". . . we conclude that petitioner is entitled to Workmen's Compensation under the laws of New Jersey . . ."

Where there is no decision against the validity of a treaty or statute of the United States, nor in favor of the validity of a statute of a state challenged because of its repugnance to the Constitution, treaties or laws of the United States, no writ lies. See *Coon* v. *Kennedy*, 39 S. Ct. 158, 248 U. S. 457, 63 L. Ed. 359.

Additional Reasons For Denying Writ

No conflict exists between the decisions of this Court and the Judgment of the New Jersey Supreme Court. In upholding the propriety of an award under the New Jersey Workmen's Compensation Act, the New Jersey Supreme Court concurred with the holding of this Court in *Grant Smith-Porter Ship Co.* v. *Rhode,* 257 U. S. 469, 66 L. Ed. 321 (1922) to the effect that a ship still under construction was sufficiently local to support state compensation remedies.

See (2a) ¶3 ". . . It was a new ship . . ." (5a) ¶2:

> "A traditional answer to the present case could be found by seizing on the undisputed fact that the ship here was new and in the process of completion by being painted as distinguished from a ship already in commerce which was being repaired. It is settled that where the worker injured on navigable waters was working on new ship construction, a state may validly provide its compensation remedy. (Cite omitted) . . ."

Respondent takes issue with the applicability of the cases of *Royal Indemnity Co.* v. *Pureto Rico Cement Corp.,* 142 F. 2d 237 certiorari den. 323 U. S. 756 (1944) on the ground that Federal Jurisdiction applied because of the specific provisions of the Defense Bases Act, 42 U. S. C. 1651-1654; and *Ryan Stevedoring Co.* v. *Pan Atlantic SS. Corp.,* 350 U. S. 124 (1956) which deals not with jurisdiction, but with the exclusiveness of liability.

Respondent further urges that the New Jersey Supreme Court's recognition of concurrent jurisdiction was in complete accord with this Court's decisions in *Calbeck* v. *Travellers Insurance Co.,* 370 U. S. 114; 8 L. Ed. (2d) 368 (1962) and *Avondale Marine Ways* v. *Henderson,* 346 U. S. 366.

Respondent further urges that the Judgment below was consistent with the holdings of this Court in the cases of *Baskin* v. *Industrial Accident Commission,* 338 U. S. 854, 70 S. Ct. 99, 94 L. Ed. 523 (1949) and *Bethlehem Steel Co.* v. *Moores,* 355 U. S. 874, 69 S. Ct. 233, 93 L. Ed. 417 (1948).

CONCLUSION

For the foregoing reasons the Petition for Certiorari should not be granted.

Respectfully submitted,

BALK, JACOBS, GOLDBERGER & MANDELL,
Attorneys for Respondent,
John Hansen,
1180 Raymond Boulevard,
Newark, New Jersey 07102